89-472

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

MAURICE WHITE, *et al.*,

Petitioners,

vs.

CELOTEX CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. Whether, when the jury's responses to special interrogatories submitted under Federal Rule of Civil Procedure 49(b) are inconsistent with each other and one or more is inconsistent with the jury's general verdict, a Federal District Court judge may enter judgment on the jury's general verdict?

2. Whether, when the jury's responses to special interrogatories submitted under Federal Rule of Civil Procedure 49(b) are inconsistent with each other and one or more is inconsistent with the jury's general verdict, an objection to the inconsistencies must be made before the jury is discharged in order to preserve the right to seek a new trial based on the inconsistencies in the jury's responses and general verdict?

List of Other Parties

The other parties to the appeal before the United States Court of Appeals for the Fourth Circuit were Petitioners Gladys White, Clifton Hood, John Wilfer, Joan Wilfer, Ernest Petticrew, Grace Petticrew, Frederick Paff, Gloria Paff, and Harry Vaughn and Respondents GAF Corporation and Keene Corporation.

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IN THE

Supreme Court of the United States

October Term, 1989

No. _____

MAURICE WHITE, *et al.*,

Petitioners,

vs.

CELOTEX CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Maurice White, Gladys White, Clifton Hood, John Wilfer, Joan Wilfer, Ernest Petticrew, Grace Petticrew, Frederick Paff, Gloria Paff and Harry Vaughn respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered June 21, 1989.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 878 F.2d 144 (4th Cir. 1989). (Appendix A, *infra.*) The United States District Court for the District of Maryland did not issue an opinion in this case.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit was entered on June 21, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

1. Federal Rule of Civil Procedure 49(b) provides:

> (b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Statement of the Case

The petitioners are insulation workers and their wives (hereinafter "workers") who brought personal injury actions against various manufacturers and suppliers of asbestos-containing insulation products in the United States District Court for the District of Maryland. Jurisdiction was based on diversity of citizenship and an amount in controversy exceeding ten thousand dollars ($10,000.00) under 28 U.S.C. Section 1332(a)(1). The workers alleged that respondents Celotex Corporation, GAF Corporation and Keene Corporation (hereinafter "manufacturers") were liable in negligence and strict liability for placing defective and unreasonably dangerous products into the stream of commerce. The workers' claims were consolidated for trial before The Honorable Joseph C. Howard of the United States District Court for the District of Maryland. Trial of the consolidated claims commenced on June 15, 1984.

After seventeen days of trial, the cases were submitted to the jury in the form of a General Verdict accompanied by Special Interrogatories pursuant to Federal Rule of Civil Procedure 49(b). The General Verdict and Special Interrogatories were identical as to each individual worker. The jury's responses to the Special Interrogatories and General Verdict were the same for each worker, as follows:

> (1) Does the plaintiff presently have a condition that was caused by inhalation of asbestos fibers from insulation products?
> Answer: Yes.[1]
>
> (2) Has the plaintiff been physically harmed by this condition?
> Answer: Yes.

[1] The workers were granted Directed Verdicts on this issue and the jury was accordingly required to answer this Interrogatory in the affirmative.

(3) Has the plaintiff incurred any damages which were proximately caused as a result of harm?
Answer: No.[2]

After the jury's responses to the Special Interrogatories and General Verdict were read in open court, the district judge inquired as to whether counsel had any requests or comments, to which all counsel responded negatively. The district judge then discharged the jury. Judgment was entered in favor of the manufacturers on July 27, 1984. (Appendix C, *infra.*)

The workers then filed a Motion for New Trial on July 27, 1984 asserting that the jury's responses to the Special Interrogatories and General Verdict were inconsistent and illogical and that entry of judgment on the illogical, inconsistent and irreconcilable jury verdicts would result in a miscarriage of justice.

A full hearing was held on the workers' Motion for a New Trial on December 7, 1984 before Judge Howard.

By Order dated September 24, 1987 Judge Howard denied the workers' motion for a new trial. (Appendix B, *infra.*)

The workers subsequently filed a Notice of Appeal on October 26, 1987.

The United States Court of Appeals for the Fourth Circuit, by *Per Curiam* Opinion dated June 21, 1989, affirmed the decision of the district court on the grounds that the failure of counsel for the workers to object to the inconsistency in the jury's verdicts before the jury was discharged constituted a waiver of the workers' right to seek a new trial. (Appendix A, *infra.*)

[2] The District Court instructed the jury that if they found that the workers had been harmed by their respective conditions but had not proved actual damages, nominal damages, such as one dollar, could be awarded.

REASONS FOR GRANTING THE PETITION

This case presents an important issue regarding the proper construction and application of Federal Rule of Civil Procedure 49(b) on which the Circuit Courts of Appeals are divided.

In this case, the Fourth Circuit based its decision on the last sentence of Rule 49(b), which provides: "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." The Court construed this sentence as imposing: "[A]n obligation on trial counsel to object to any asserted inconsistencies in the response to jury interrogatories prior to the discharge of the jury." (Appendix A, *infra.*) Based on this construction of Rule 49(b), the Court held: "[F]ailure to bring any purported inconsistencies in the jury's verdict to the attention of the court prior to the release of the jury will constitute a waiver of a party's right to seek a new trial." (Appendix A, *infra.*)

The Fourth Circuit's construction and application of the last sentence of Rule 49(b) is in accord with the decisions of the Fifth, Seventh, and Eighth Circuits. *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529 (5th Cir. 1974); *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987); *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114 (8th Cir. 1972).

The Second, Sixth and Ninth Circuits, however, hold that the failure to object to such inconsistencies before the jury is discharged does not constitute a waiver of the issue as grounds for a new trial under Rule 49(b).

In *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629 (2d Cir. 1986), the Court held: "[W]hile a party's failure to object to such a double inconsistency carries some weight in our analysis on appeal, the terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made." *supra* at 634. The Court thus considered whether the responses were, in fact, inconsistent notwithstanding counsel's failure to object before the jury was discharged.

The holding of the Sixth Circuit in *Bahamas Agricultural Industries v. Riley Stoker Corp.*, 526 F.2d 1174 (6th Cir. 1975) supports the proposition that the failure to object to inconsistencies in the jury's responses to special interrogatories and its general verdict does not constitute a waiver of the right to seek a new trial on these grounds.

In construing the last sentence of Rule 49(b), the Court held:

> Rule 49(b) is explicit on the options available to the trial judge when the responses to the interrogatories are inconsistent with each other and one or more is inconsistent with the general verdict. The trial judge is permitted only to return the jury for further consideration of its answers and verdict, or to order a new trial. Rule 49(b) gives the trial judge no authority to enter judgment for any party in this situation. *Bahamas Agricultural Industries, Ltd., supra* at 1183.

Under this construction of the last sentence of Rule 49(b), the trial judge is prohibited from entering judgment but can only return the jury for further consideration of its answers and verdict or order a new trial. Thus, the failure to object to the inconsistencies cannot constitute a waiver; permitting a waiver would

allow the trial judge to enter judgment, a result expressly prohibited under the Sixth Circuit's construction of Rule 49(b).

While the Fourth Circuit in the case at bar expressly based its holding on the last sentence of Rule 49(b), the inconsistency presented by the jury's responses and verdicts in these cases more closely resemble the type of inconsistency addressed by the second to last sentence of Rule 49(b) (*i.e.* where answers to special interrogatories are consistent with each other but are inconsistent with the general verdict). The Circuit Courts of Appeals are in conflict as to the construction and application of this aspect of Rule 49(b) as well.

In the case at bar, the Fourth Circuit cited *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982) and *Diamond Shamrock Corp. v. Zinke and Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir. 1986) in support of its holding. These cases construe the second to last sentence of Rule 49(b) as requiring an objection to the inconsistency prior to the discharge of the jury to preserve the right to seek a new trial.

The First and Tenth Circuits' construction of the second to last sentence of Rule 49(b), as set forth in *Fernandez, supra* and *Diamond Shamrock Corp., supra*, conflicts with the decision of the Ninth Circuit in *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987), in which the Court held that the failure to object to the inconsistency addressed by the second to last sentence of Rule 49(b) does *not* result in a waiver of that issue on appeal. *supra* at 1354-6.

This Honorable Court granted Certiorari to resolve the conflict among the Circuit Courts of Appeals regarding Federal Rule of Civil Procedure 56 in *Celotex Corporation v. Catrett, cert. granted,* 474 U.S. 342, 105 S.Ct. 1863, 85 L.Ed.2d 157 (1985). Petitioner respectfully submits that the conflict presented in this Petition regarding Federal Rule of Civil Procedure 49(b) provides an equally compelling basis for review by This Honorable Court.

This fundamental conflict among the Circuit Courts of Appeals regarding the proper construction and application of Federal Rule of Civil Procedure 49(b) can only be resolved by the Supreme Court. Certiorari should therefore be granted to resolve this conflict and re-establish uniformity of practice in the Federal Court system.

Conclusion

For the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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September 18, 1989

APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-2196

MAURICE WHITE; GLADYS WHITE; CLIFTON HOOD; JOHN WILFER; JOAN WILFER; ERNEST; GRACE PETTICREW; FREDERICK PAFF; GLORIA PAFF; HARRY VAUGHN,

Plaintiffs-Appellants,

vs.

CELOTEX CORPORATION; GAF CORPORATION; KEENE CORPORATION,

Defendants-Appellees,

and

JOHNS-MANVILLE CORPORATION; JOHNS-MANVILLE SALES CORPORATION; JOHNS-MANVILLE PRODUCTS CORPORATION; OWENS-ILLINOIS GLASS COMPANY; UNARCO INDUSTRIES, INC.; EAGLE-PRICHER INDUSTRIES, INC.; ARMSTRONG CORK COMPANY; NICOLET INDUSTRIES

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-80-3336, CA-80-3334, CA-80-3333, CA-80-3313, CA-80-3307, CA-79-2260).

Argued: October 6, 1988 Decided: June 21, 1989

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

Antonio Douglas Pyle (HENDERSON & GOLDBERG, P.C.; James J. Fabian, PFEIFER & FABIAN on brief) for Appellant. F. Ford Loker (Andrew M. McDonald (WHITEFORD, TAYLOR & PRESTON on brief) for Appellee.

PER CURIAM:

This is a consolidated appeal by six insulation workers and their wives from a judgment of the district court in favor of the appellees, manufacturers and suppliers of asbestos-containing insulation products. After the jury was dismissed, appellants moved for a new trial on the grounds that the jury's response to the interrogatories submitted to it was inconsistent, illogical, and against the weight of evidence presented at trial. The district court denied the motion on the ground that such motion was not timely made and was therefore barred from consideration by Fed.R.Civ.P. 49(b). We affirm.

I.

Appellants are a group of insulation workers and their wives ("workers") who were employed as asbestos insulators for various companies in and around Baltimore, Maryland. Appellants brought these personal injury claims against both manufacturers and suppliers of asbestos-containing insulation products ("manufacturers"). The workers asserted that manufacturers, Celotex, GAF and Keene, were liable in negligence and in strict liability for placing defective and unreasonably dangerous products into the stream of commerce. These claims of the several workers were consolidated for trial.

At trial, the workers presented a number of expert medical witnesses who testified about the various medical conditions each suffered as a result of exposure to asbestos fibers. In order to demonstrate that such asbestos-related disease caused the workers no compensable harm, the manufacturers presented credible medical experts who demonstrated how other factors such as cigarette smoke, cardiovascular disease, lack of exercise and obesity could reasonably have caused the workers' physical condition.

The cases were submitted to the jury on special interrogatories, prepared and agreed upon by counsel for the litigants, pursuant to Fed. R. Civ. P. 49(b). The jury considered each of the worker's cases individually, although the submitted interrogatories in each case were identical. The response by the jury to the submitted interrogatories was the same for each worker:

> (1) Does the plaintiff presently have a condition that was caused by inhalation of asbestos fibres from insulation products? A: Yes.[1]

[1] Upon motion of the workers at the close of their case the court ordered that the interrogatory be answered in the affirmative by the jury.

(2) Has the plaintiff been physically harmed by this condition? A: Yes.

(3) Has the plaintiff incurred any damages which were proximately caused as a result of the harm? A: No.

After the reading of the responses of the jury to the three interrogatories, the following colloquy between the district judge and counsel for the various parties took place:

JUDGE HOWARD: Any requests from the plaintiff?

MR. PYLE: [workers' counsel]: No, Your Honor.

THE COURT: Harken the verdict.

THE CLERK: Members of the jury harken to your verdict as the Court hath recorded it as to all plaintiffs, the written interrogatories and answers thereto having been read by the clerk and answered by your foreman, and so you say all? The jury finds in favor of the defendants against the plaintiffs.

THE COURT: Gentlemen, anything I should tell the jury before I make my comments?

MR. LOKER: [manufacturers' counsel]: No, sir, I don't believe there is.

MR. PYLE: No, sir.

MR. PARKS: [manufacturers' counsel]: No, sir. We thank you, Your Honor.

The jury was then discharged and judgment was entered for the manufacturers on July 27, 1984 without objection by counsel for the workers. Subsequently, on July 27, 1984, counsel for the workers filed a written motion for a new trial asserting that the jury's verdict should be set aside because of inconsistencies in the responses to the interrogatories. More specifically, the

workers contend that the jury's answer to the third interrogatory was so inconsistent with the answers to interrogatories one and two as to render the verdict completely illogical.

Following a full hearing, in which the issue was briefed and argued, the district judge, relying on Rule 49(b), denied the workers' motion for failure to file a timely objection to the jury's verdict. This appeal followed.

II.

The workers here argue that the trial court committed error in failing to grant their motion for a new trial. The manufacturers respond that such a motion was not timely filed under Fed. R. Civ. P. 49(b) or, in the alternative, that even if such a motion were timely filed, the jury's interrogatory answers were consistent, logical, and well supported by the evidence.

With regard to a general jury verdict, Rule 49(b) states in relevant part that:

> When the answers [to interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Inherent in such language is the imposition of an obligation upon trial counsel to object to any asserted inconsistencies in the response to jury interrogatories prior to the discharge of the jury. *Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), *Merchant v. Ruhle*, 740 F.2d 86, 89 (1st Cir. 1984).

Proper respect for the Rule mandates that failure to bring any purported inconsistencies in the jury's verdict to the attention of the court prior to the release of the

jury will constitute a waiver of a party's right to seek a new trial. This conclusion accords with the application of the Rule adopted in the majority of the circuits which have considered this issue.[2] *See e.g., Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987); *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir.), *cert. denied*, 479 U.S. 1007, (1986); *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983); *Stancill v. Mackenzie Tank Lines, Inc.*, 497 F.2d 592 (5th Cir. 1974); *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114 (8th Cir. 1972); 5A Moore's Federal Practice ¶49.04, pp. 49-62 (1988), *but see, Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 635 (2d Cir. 1986); *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987); 9 C. Wright & A. Miller, Federal Practice and Procedure §2513 at 527-28 (1971).

The purpose of such a Rule is plain, to promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for another presentation of the evidence to a new body. *Skillen v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981). In the case at bar, counsel for the workers waited until after the jury was excused before raising a claim of inconsistency. Counsel now argues that the workers' motion for a new trial reclaimed their right to appeal as to an alleged inconsistency with a general verdict under Rule 49(b). This is simply an attempt by counsel to make an end run around the plain meaning of the Rule. The workers' construction of Rule 49(b) "eliminates the rule's

[2] In *Ladnier v. Murray*, 769 F.2d 195, 198 n.3 (4th Cir. 1985), we stated that the legal error resulting from entry of judgment based on inconsistent answers to Rule 49 interrogatories may be an error of constitutional magnitude, infringing upon a litigant's Seventh Amendment right to a trial by jury by allowing the district court to usurp the jury's function. *Ladnier*, however, concerned the application of Rule 49(a) rather than Rule 49(b).

incentives for efficient trial procedure and opens the door to the possible misuse of the rule's procedures by parties anxious to circumvent an unsatisfactory jury verdict by procuring a new trial." *United States Football League v. National Football League*, 644 F. Supp. 1040, 1049 n. 8 (S.D.N.Y. 1986), *aff'd* 842 F.2d 1335 (2d Cir. 1988); *Skillen v. Kimball*, 643 F.2d at 20.

III.

In summary, we hold that timely objection under Rule 49(b) was a prerequisite to the grant of a new trial. Counsel for the workers did not timely object, accordingly the judgment of the district court is *AFFIRMED.*

APPENDIX B

Order of the United States District Court for the District of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JUNE 1984 ASBESTOS LITIGATION

Civil Nos. JH-79-2260; JH-80-3307; JH-80-3313; JH-80-3333; JH-80-3334; JH-80-3336; JH-82-1937.

MAURICE WHITE, et al.,

v.

CELOTEX CORPORATION, et al.

ORDER

Upon consideration of plaintiffs' motion for a new trial and defendant Celotex Corporation's response thereto, it is this 24th day of September, 1987, by the United States District Court for the District Court for the District of Maryland,

ORDERED:

1) that plaintiffs' motion for a new trial BE, and the same hereby IS, DENIED;

2) that the Clerk mail copies of this Order to the counsel of record.

JOSEPH C. HOWARD
Joseph C. Howard
United States District Judge

_____ Filed _____ Entered
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SEP 28 1987

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

APPENDIX C

Judgment Order of the United States District Court for the District of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAURICE WHITE, et ux.
v. CIVIL NO. JH-79-2260
JOHNS-MANVILLE CORP., et al. CIVIL NO. JH-81-1937

CLIFTON L. HOOD
v. CIVIL NO. JH-80-3307
JOHNS-MANVILLE CORP., et al.

JOHN M. WILFER, et ux.
v. CIVIL NO. JH-80-3313
JOHNS-MANVILLE CORP., et al.

ERNEST L. PETTICREW, et ux.
v. CIVIL NO. JH-80-3333
JOHNS-MANVILLE CORP., et al.

FREDERICK J. PAFF, et ux.
v. CIVIL NO. JH-80-3334
JOHNS-MANVILLE CORP., et al.

HARRY G. VAUGHN
v. CIVIL NO. JH-80-3336
JOHNS-MANVILLE CORP., et al.

JUNE 1984 ASBESTOS LITIGATION
JUDGMENT ORDER

The claims of these ten plaintiffs against the defendants in the above styled actions having been variously stayed by the court pending the resolution of related proceedings in bankruptcy, or settled by the parties, or dismissed pursuant to the granting of motions for summary judgment, or for directed verdict, or resolved by a jury, presided over by the undersigned, it is this 27th day of July, 1984, hereby

ORDERED AND ADJUDGED: 1. That the court having granted motions for summary judgment in favor of the defendants as to the claims of Mr. and Mrs. White against Armstrong World Industries, Inc. (also sued as Armstrong Cork Company) and Pittsburgh Corning Corp., and as to the claims of Mr. and Mrs. Paff against Armstrong World Industries, Inc. (also sued as Armstrong Cork Co.), Fibreboard Corp. and Owens-Illinois, Inc., judgment IS ENTERED in favor of said defendants against said plaintiffs, only; and

2. That the court having granted motions for directed verdict in favor of the defendants as to all claims of Mr. Paff against Celotex Corp., and as to the loss of consortium claims of all of the married plaintiffs against Celotex Corp., GAF Corp. and Keene building Products Corp., judgment IS ENTERED in favor of said defendants against said plaintiffs, only; and

3. That those claims of all of the plaintiffs against Celotex Corp., GAF Corp. and Keene Building Products Corp. which were not resolved by motions for directed verdict (set out in paragraph 2, *supra*) having been duly tried, and the jury having rendered its verdict, the judgment order entered by the clerk on July 18th, 1984, is VACATED, and judgment is RE-ENTERED in favor of said defendants against the plaintiffs, only; and

4. That the court having been advised by counsel for the parties that the claims of Mr. and Mrs. White against Owens-Illinois, Inc., the claims of Mr. Hood against Armstrong World Industries, Inc. (also sued as Armstrong Cork Co.), Owens-Illinois, Inc. and Pittsburgh Corning Corp., the claims of Mr. and Mrs. Wilfer against Armstrong World Industries, Inc. (also sued as Armstrong Cork Co.), Fibreboard Corp., Owens-Illinois, Inc. and Pittsburgh Corning Corp., the claims of Mr. and Mrs. Petticrew against Armstrong World Industries, Inc. (also sued as Armstrong Cork Co.), Owens-Illinois, Inc. and Pittsburgh Corning Corp., the claims of Mr. and Mrs. Paff against Pittsburgh Corning Corp., and the claims of Mr. Vaughn against Armstrong World Industries, Inc. (also sued as Armstrong Cork Co.), Owens-Illinois, Inc. and Pittsburgh Corning Corp., and the claims of all ten plaintiffs against Eagle-Picher Industries, Inc., Forty-eight Insulations, Inc., Nicolet Industries, Inc., Owens-Corning Fiberglas Corp. and Raymark Industries, Inc. (initially sued as Raybestos-Manhattan, Inc.) have been settled, including the various related cross-claims by and against the hereinlisted defendants, these claims are DISMISSED, without prejudice to the right of any of the parties thus affected to move to reopen the case(s) as to any claim(s) as to which settlement is not consummated within sixty (60) days of the date of this judgment order, upon a showing of good cause; further, the parties affected by this dismissal shall bear their own costs unless otherwise agreed between and among themselves; and

5. The claims of Mr. and Mrs. White against Johns-Manville Products Corp., and the claims of all ten of the plaintiffs against Johns-Manville Corp., Johns-Manville Sales Corp. and Unarco Industries, Inc. having

been severed and stayed pending the resolution of related proceedings in bankruptcy, and it appearing to the court that said claims will remain static in said posture for an indeterminate amount of time, said claims shall be and are ADMINISTRATIVELY CLOSED, without prejudice to the right of any of the parties thus affected to move to reopen the case(s) as to any claim(s) as to which the resolution of the proceedings in bankruptcy is unsatisfactory within ninety (90) days of the resolution of said proceedings in bankruptcy, upon a showing of good cause.

Dated in Baltimore, Maryland.

JOSEPH C. HOWARD
JOSEPH C. HOWARD
United States District Judge

FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAURICE WHITE, *et al.*,

Petitioners,

v.

CELOTEX CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. Whether Petitioners have waived appellate review of the alleged inconsistency in the jury's responses to Rule 49(b) special verdict interrogatories, because they failed to object to the alleged inconsistency prior to the discharge of the jury.

2. Whether the Federal District Court correctly exercised its discretion in denying Petitioners' motion for a new trial, where the evidence was sufficient to support the responses of the jury to special verdict interrogatories and where these responses and the general verdict for Respondents were consistent and harmonious.

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Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 49(b). 4,7,8,13

In The

Supreme Court of the United States

October Term, 1989

No. 89-472

MAURICE WHITE, et al.,

Petitioners,

vs.

CELOTEX CORPORATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents Celotex Corporation, GAF Corporation and Keene Building Products Corporation respectfully pray that this Court deny a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered June 21, 1989.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 878 F.2d 144 (4th Cir. 1989). The United States District Court for the District of Maryland did not publish an opinion in this case.

Statement of the Case

Respondents generally accept the Statement of the Case contained in the Petition for Writ of Certiorari, with the addition that Respondents produced expert medical testimony at trial that none of the Petitioners suffered from any impairment as a result of asbestos exposure.

REASONS FOR DENYING THE PETITION

Petitioners sidestep the fundamental and antecedent question of whether the jury's answers to the Federal Rule of Civil Procedure 49(b) special verdict interrogatories were inconsistent. They simply assume the inconsistency. Of course, "settled principles require that [courts] harmonize the jury's several pronouncements if possible rather than use the answers to special questions as weapons for destroying the general verdict. . . . Unless there is no 'possible view of the case' on which valid findings support the general verdict . . . . we must uphold the jury's final decision to avoid a potential 'collision with the Seventh Amendment.'"

Julien J. Studley, Inc. v. Gulf Oil Corp., 407 F.2d 521, 526-527 (2d Cir. 1969). See also, Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962), reh. den., 369 U.S. 882; Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 119 (1963).

In the present case, the jury's answers were neither inconsistent nor illogical. The jury simply concluded that, while the Petitioners may have sustained minor physiological changes from asbestos exposure, these changes were too trivial and non-impairing to support an award of monetary damages. Respondents' medical expert witnesses testified at trial that none of the Petitioners was impaired as a result of any physiological change attributable to asbestos exposure. Several Plaintiffs

had long histories of tobacco abuse which easily accounted for any subjective complaints of shortness of breath. Certainly it is not an inconsistency for the jury to believe the Respondents' experts.

In addition, the jury's finding that the Petitioners had not "incurred any damages proximately caused as a result of the harm" of their asbestos-related conditions (Jury Interrogatory 3) was tantamount to, and harmonious with, the rendering of a general verdict in favor of Respondents.

The fact that the jury's answers readily can be harmonized with one another and with the general verdict for Respondents renders Petitioners' arguments concerning their untimely objections moot.

The thrust of the Petition is not that the Fourth Circuit was wrong in affirming the final verdicts based on Petitioners' counsels' failure to object timely to the verdicts. Rather, Petitioners merely raise the prospect of a "split among the Circuit Courts" on when objections must be made under Rule 49(b) to justify the extraordinary grant of a writ of certiorari. Issues such as the timeliness of objections to preserve appellate review of the sufficiency of evidence to sustain jury verdicts does not seem to be the stuff of paramount public importance so as to merit review by this Court.

In support of their contention that a conflict exists among the Circuit Courts regarding Federal Rule of Civil

Procedure 49(b), Petitioners cite just three cases. These cases demonstrate no such conflict.

Petitioners contend that the Ninth Circuit broadly held in Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351 (9th Cir. 1987), that failure to object to inconsistent jury answers before the jury is discharged does not result in a waiver of that issue on appeal. The holding in the Los Angeles Nut House case is narrow. In fact, the Ninth Circuit held only that an objection to an alleged inconsistency is not waived on appeal, where the trial judge does not ask for objections prior to excusing the jury. Id. at 1354-1356. In the present case, after the jury's answers were read, the trial judge explicitly asked all counsel in open court if any had

questions or comments before the jury was discharged. All counsel, including counsel for Petitioners, responded negatively. Only then was the jury discharged. Thus, Petitioners' reliance on Los Angeles Nut House, supra, is misplaced.

The Ninth Circuit did note in Los Angeles Nut House, supra, that when an inconsistency exists between a general verdict and a written jury interrogatory, the inconsistency should be resolved in favor of sustaining the general verdict if possible. Id. at 1353-1354. This would indicate that the instant interrogatories should be conformed to the general defense verdict.

In Bahamas Agricultural Industries, Limited v. Riley Stokes Corporation, 526 F.2d 1174 (6th Cir. 1975), the Court did

not address directly the issue of the timeliness of an objection to inconsistent jury answers. This case is thus inapposite. The decision in Bahamas Agricultural Industries, supra, concerned jury interrogatory answers which were patently inconsistent with one another and with the general verdict. The jury incongruously found: (1) that the negligence of Defendant Riley Stokes Corporation was not a proximate cause of the stipulated damages; and (2) that the Plaintiff was 80 percent negligent. Nevertheless, the jury awarded a general verdict in favor of Plaintiff against Defendant. The Sixth Circuit found in this case an unreconcilable inconsistency in the jury's answers. It ruled that the trial judge should have returned the jury

for further consideration of its answers or ordered a new trial.

The Second Circuit decision cited by Petitioners is similarly inapposite. In Schaafsma v. Morin Vermont Corp., 802 F.2d 629 (2d Cir. 1986) the court's decision did not turn on the timeliness of the objection to allegedly inconsistent jury answers. Rather, it dealt with the court's finding that the jury's answers were not inconsistent at all. Id. at 635. The court noted that "in fairness to trial courts and in order to preserve parties' Seventh Amendment rights, appellate courts 'struggle' to find a way of reconciling seemingly inconsistent interrogatory answers and verdicts...." Id. at 635. The Second Circuit reversed the trial court in part due to the court's faulty charge to the

jury and failure to include an interrogatory concerning a requested remedy, i.e. rescission.

No genuine conflict exists between the Circuits with regard to the necessity of timely objection to allegedly inconsistent jury interrogatory answers. The three cases upon which Petitioners rely to demonstrate such a conflict upon analysis are easily distinguishable. Either the references to failure to object to allegedly inconsistent verdicts before discharge of the panel were obiter dicta, or the trial court never inquired of counsel about such inconsistencies before dismissing the jurors. Neither situation is apposite to the instant case. The verdicts were totally consistent and in harmony with the general defense verdicts. There was

ample evidence from the medical experts to support the defense verdicts. Also, even though specifically solicited for comments before discharge of the jury, Petitioners' counsel never intimated any problem with the consistency of the verdict until the filing of a motion for new trial, days after the trial ended. As the Fourth Circuit pointed out, to adopt Petitioners' construction of Rule 49(b) "eliminates the rule's incentives for efficient trial procedure and opens the door to the possible misuse of the rule's procedures by parties anxious to circumvent an unsatisfactory jury verdict by procuring a new trial." United States Football League v. National Football League, 644 F.Supp. 1040, 1049 n. 8 (S.D.N.Y. 1986), aff'd 842 F.2d 1335 (2d Cir. 1988); Skillen v. Kimball, 643 F.2d 19, 20 (1st Cir. 1981).

Conclusion

For the foregoing reasons, Respondents respectfully pray that this Court deny a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

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October 25, 1989

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 1989 I mailed, first class postage prepaid, three copies of the proceding Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit to: Thomas W. Henderson, Esquire, Antonio D. Pyle, Esquire, 1030 Fifth Avenue, Third Floor, Pittsburgh, Pennsylvania 15219.

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